

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-339739 AND ALL  
OTHER SEAMAN DOCUMENTS  
Issued to: Atallah F. SUNUNU

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1853

Atallah F. SUNUNU

This appeal has been taken in accordance with Title 46 United States Code 239 (g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 20 May 1970, an Examiner of the United States Coast Guard at New York, N.Y., admonished Appellant upon finding him guilty of misconduct. The specification found proved alleges that Appellant did "or on about 3 April 1970 wrongfully fail to appear as a witness, pursuant to an investigation, as directed in a subpoena dated 3 April 1970 and duly issued and served by LTJG M. R. PERKINS, Investigating Officer, concerning an incident occurring on board the SS AFRICAN STAR on or about 29 January 1970 while said vessel was at Lagos, Nigeria."

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of the officer who issued and served the subpoena, and the subpoena itself.

In defense, Appellant offered no evidence.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order admonishing Appellant.

The entire decision was served on 28 May 1970. Appeal was timely filed on 20 June 1970. Although Appellant had until 16 November 1970 to perfect his appeal he has added nothing to his statement made on original filing of notice.

FINDINGS OF FACT

Because of the disposition necessary in this case formal

findings of fact are not necessary in this decision. One operative and controlling fact is discussed in the OPINION below.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

- "1. The Examiner's decision is contrary to the weight of the evidence.
- "2. The Government failed to sustain the burden of proving misconduct.
- "3. Mr. Sununu was exempt from service of the subpoena both legally and in accordance with Coast Guard regulations."

APPEARANCE: Abraham E. Freedman, New York, N.Y., by George J. Cappiello, Esq.

#### OPINION

Appellant's statement of grounds for appeal, which I have quoted above, are so broadly stated, especially the first two items, as not to constitute assertions of error upon which meaningful rulings could be made. Nevertheless, I take this opportunity to note material in the record relative to the third item so as to dispel certain apparent misconceptions.

Appellant had argued at hearing that he was immune to service of process under New York law since he was a resident of Massachusetts who had voluntarily entered New York to testify in a legal proceeding. Much of the record, the briefs filed before the Examiner, and the opinion of the Examiner, explore the question of New York law.

The law of the State in which a hearing is held, or in which a subpoena is served, or in which notice of hearing is given has no bearing upon the efficacy of service of process in a Federal administrative proceeding.

All in all, the sum of Appellant's assertions does not amount to a statement of reversible error by the Examiner.

#### II

There is, however, a fatal defect in the procedure. The subpoena issued to Appellant was defective on its face.

The Investigating Officer who prepared and served the subpoena testified as to the circumstances of the matter: Another seaman had been served with charges involving alleged misconduct aboard the vessels. On motion the examiner hearing the case granted a severance of allegations of misconduct aboard the SS AFRICAN STAR and the specifications dealing with that matter were withdrawn, with the intention of preferring a new charge to be heard in a separate hearing. The investigating officer in that case learned that Appellant was present at the time, prepared to testify voluntarily in behalf of the person charged in that case. Knowing that Appellant was a potential witness in the AFRICAN STAR matter and wishing to question him about the matter, he prepared and served the subpoena involved in the instant case. Without going into the methods used by Appellant, on the advice of a lawyer who later became Appellant's counsel on this record, to frustrate service by refusing to accept the piece of paper on which the notice was written (an insufficient device), it may be said that Appellant's failure to appear at the time and place specified resulted in the preferral of the charge in the instant case.

The specification here speaks of a failure "to appear as a witness, pursuant to an investigation...concerning an incident occurring on board the SS AFRICAN STAR on or about 20 January 1970 while said vessel was at Lagos, Nigeria." The specification in no way suggests the nature of the "incident." While not necessarily determinative of this case the failure to specify the nature of the "incident" is of some significance.

Investigating officer are authorized to issue subpoenas by two regulations issued pursuant to R.S. 4450: 46 CFR 136.07-5 (as to investigating of marine casualties) and 46 CFR 137.15 (as to investigation into the conduct or condition of individuals, whether or not a marine casualty is involved, and hearings held after service of charges on and notice of hearing to the person charged). A person to whom a subpoena is issued is entitled to know the matter in which he has been subpoenaed to testify or to produce documents.

A subpoena issued under 46 CFR 136 gives sufficient notice when it identifies the marine casualty which is the subject of the investigation. I observe that as a matter of practice the subpoena is rarely resorted to in such a case.

A subpoena issued under 46 CFR 137 gives sufficient notice when it identifies the person whose conduct or condition is under investigation. When a subpoena is issued under 46 CFR 137 it is customary and sufficient to identify the subject as "In the Matter of Merchant Mariner's Document issued to John Doe, Z-000000."

The subpoena in this case, while it might have been intended to compel attendance before the investigating officer to give testimony in the investigation of the misconduct or negligence of the other seaman involved in the "incident" aboard AFRICAN STAR, did not do so.

The principal defect here is not merely that the specification does not identify the nature of the "incident;" it is that on its face the subpoena bears no relation to the incident at all. The caption reads, "In the Matter of MMD Z-339739" without more, and the subpoena is directed to Appellant. "Z-339739" is the Appellant's own seaman's identification number. The subpoena thus did not order Appellant to appear and testify in the matter of some marine casualty or in the matter of an investigation of some marine casualty or in the matter of an investigation into the conduct of some other seaman.

Thus the purported impact of the subpoena was to compel Appellant's appearance for an investigation into the matter of his own merchant mariner's document. Just as a person charged is not a compellable witness at his own hearing under 46 CFR 137 he is not compellable witness at an investigation under 46 CFR 137 into his own conduct. He is therefore not amenable to subpoena at any stage when his own seaman's papers are the subject of the inquiry.

I wish to make it clear that this holding does not in any way affect the amenability of a person to subpoena under R.S. 4450 for appearance before any investigation body under 46 CFR 136 or before any investigating officer or examiner under 46 CFR 137 simply on the grounds that his conduct may later be brought into question as a result of investigation into some marine casualty or into the conduct of some person whether or not a marine casualty was involved. Any remedy that such a person has in such circumstances is constitutional, if it exists (a question that need not be explored here), and must be asserted before the proper tribunal. The fact that a remedy may be available does not excuse non-compliance with a subpoena by non-appearance ordered. These considerations, however, do not save the government's position which falls on the invalidity of the subpoena issued in the instant case.

The written document on which the whole case is predicated commands Appellant to appear before an investigating officer and testify as to the matter purportedly involving only Appellant's own merchant mariner's document.

This is not a valid subpoena. It may not have expressed the intent of the investigating officer who issued it. The intent of

the issuing authority is not the matter in question; what is involved is what the document said. It did not say anything that compelled Appellant to appear at a time and place to testify in a matter in which he was a compellable witness.

ORDER

The order of the Examiner dated at New York, N.Y. on 20 May 1970, is VACATED and the charges are DISMISSED.

C.R. BENDER  
Admiral, U.S. Coast Guard  
Commandant

Signed at Washington, D.C., this 16th day of September 1971.

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